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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 1279

JOSEPH COLOMBO, LAWRENCE GALLO, ALBERT GALLO, JOHN ODDO, JOSEPH LIVOTI, SALVATORE PERITORE,

Petitioners,

v.

AARON E. KOOTA, DISTRICT ATTORNEY, KINGS COUNTY, NEW YORK ON BEHALF OF A CERTAIN GRAND JURY; AND THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

JOINT PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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Petitioners, Joseph Colombo, Lawrence Gallo, Albert Gallo, John Oddo, Joseph Livoti and Salvatore Peritore, pray, by this joint petition, that a writ of certiorari issue to review a certain order of the Court of Appeals of the State of New York entered in the above entitled case on March 24, 1966 and described *infra.*

Opinions Below

The opinion of the Court of Appeals of the State of New York, not yet reported, is printed as Appendix A hereto, *infra.* The Appellate Division of the Supreme Court of the State of New York, Second Department, did not render an opinion. The opinion of the Supreme Court of the State of New York, Kings County, Criminal Term Part I (Hon. Hyman Barshay, J.), not reported, is printed as Appendix B hereto, *infra.*

Jurisdiction

The order (remititur) of the Court of Appeals of the State of New York here sought to be reviewed is dated March 24, 1966.* That order affirmed respective orders entered January 17, 1966 by the Appellate Division of the Supreme Court of the State of New York, Second Department, which in turn had affirmed (without opinion) respective judgments entered in the Supreme Court of the State of New York, Kings County (Barshay, J.), on December 15, 1965 adjudging each of the within petitioners guilty of criminal contempt and sentencing each of them to 30 days imprisonment and a fine of $250.

As recited in more detail in our Statement, *infra*, these criminal contempt proceedings arise out of a State grand jury investigation of alleged infiltration of legitimate businesses by criminal elements using illicitly obtained money. The within petitioners having been subpoenaed by said

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* By inadvertence, counsel failed to secure a copy of the above mentioned order or remittitur for inclusion as an appendix to this petition; owing to severe time pressures occasioned by our having only a 30-day stay of execution of the criminal contempt judgments here involved—i.e., a stay pending these joint applications for certiorari—our request in the Courts below for expedited certification of the record resulted in the certified record's having been transmitted to this Court a few days ago without our having made a copy of the order or remittitur, and we are advised that no copy thereof is now obtainable except from the Clerk of this Court. Since this joint petition for certiorari must be lodged in this Court as promptly as possible for purposes of an application for further stay which we are making before Mr. Justice Harlan, we are having this joint petition printed in final form without inclusion of a copy of the order or remittitur; as indicated, however, said order is, of course, included in the certified record which is already filed with the Clerk of this Court. If a supplemental printing should be required (as to which we shall make inquiry to the Clerk of this Court) such will be done.

Grand Jury, took the basic position that, before the Grand Jury could constitutionally override the witnesses' claims of privilege against self incrimination by compelling them to testify under grant of immunity, the witnesses were entitled to know from the Grand Jury something by way of specific factual apprisal that would indicate whether the Grand Jury actually had a bona fide justification for summoning these witnesses in the asserted "racketeering" inquiry, or whether instead these witnesses (the within petitioners) had merely been brought before the Grand Jury on a dragnet basis supported by nothing more than suspicion and a spirit of "meddlesome inquiry"*, i.e., whether the Grand Jury and the prosecutor were engaging in a sham inquiry whose only real "purpose" was to clap into jail on criminal contempt charges these six individuals who happen to be unluckily vulnerable because of their unfavorable reputations.

These petitioners took the position, then, before the Grand Jury (and in the subsequent contempt proceedings and in the State Court appeals from the contempt convictions), that due process of law entitled them to a full judicial trial of the fundamental issue of constitutional fact as to the bona fides of the Grand Jury's asserted interest in them, and specifically they requested that the full Grand Jury minutes of the alleged investigation be disclosed in order to test out this issue of constitutional fact. All of the Courts below have evidently concluded that this defense of constitutional fact need not be judicially heard or tried because it was sufficient that the Trial Judge alone examined the full Grand Jury minutes *in camera*. Thus, the

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* This term "meddlesome inquiry" comes from this Court's decision in *Hale* v. *Henkel*, 201 U.S. 43, 64, which we discuss *infra*.

basic Federal constitutional question which this joint petition brings before this Court is whether the Fourteenth Amendment due process clause and the Fifth Amendment privilege against self incrimination have been violated by the use of State summary* criminal contempt procedures to dispose of the aforementioned defense based on issues of constitutional fact. Other Federal questions are noted at appropriate places *infra.*

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3), since the petitioners are claiming rights, privileges or immunities under the Constitution of the United States (Fifth Amendment self incrimination and Fourteenth Amendment due process); and because, in view of the resort to state summary criminal contempt procedures, there is necessarily drawn in question the validity of a State statute as applied (N.Y. Judiciary Law §750—"Power Of Courts To Punish For Criminal Contempts"). We also challenge the constitutionality, under the Fifth and Fourteenth Amendments, of the New York State immunity legislation here involved (N.Y. Penal Law §2447), on grounds indicated *infra.*

Questions Presented

A State Grand Jury subpoenaed the petitioners to testify about an alleged conspiracy to infiltrate legitimate businesses with illicitly obtained money. Petitioners' only ap-

* As further recited *infra,* the opinion of the Court of Appeals herein contains expressions to the effect that the contempt procedure was not "summary". We believe it is demonstrable (*infra*) that surely at least as regards the question of an adjudicative hearing or trial with respect to the subject matter which indisputably was considered only *in camera* as above mentioned, the contempt proceedings were "summary" in character.

parent "connection" with any such claimed subject of investigation is that they belong to a part of the New York metropolitan community which tends to be regarded by prosecutors and communications media as fair game for sensationalistic charges of "racketeering". Petitioners' requests that the Grand Jury inform them whether they had been called on any ground other than their unfavorable reputations were met only with generalized statements about the "purpose" of the investigation to inquire about the infiltration of legitimate businesses, etc. Facing a Court direction to answer the Grand Jury's questions and conviction for criminal contempt as the alternative, petitioners asked for a full due process judicial trial to test out the basic bona fides of the Grand Jury's inquiry as to them in relation to the allegations of illicit infiltration of businesses, and for this purpose petitioners asked that the full Grand Jury minutes be revealed. Petitioners also urged that the unsupported representations of "purpose" by the Grand Jury were a sham or a screen to enable the prosecutor to clap petitioners into jail for a while *via* ostensible procedures of immunity conferral and contempt conviction, petitioners claiming that their misfortune in being persons of alleged ill repute rendered them peculiarly vulnerable to this sort of prosecutive aggression. Petitioners' requests and contentions were rejected, and they were summarily convicted of criminal contempt and sentenced to imprisonment and to fine. The questions are:

1. Were petitioners entitled to a full due process hearing in defense against the charges of criminal contempt, with access to the complete Grand Jury minutes, and with opportunity to test out the bona fide factual justification

for the Grand Jury's conclusory assertions that it was investigating an alleged conspiratorial infiltration of illicitly obtained money into legitimate businesses; and, in particular, to litigate whether the alleged basis for the assertion that petitioners were involved in those situations was sham or insufficiently substantial?

2. Does not the denial of the due process opportunity to litigate the defense that the Grand Jury and the prosecutor were acting in bad faith, work an especially acute due process offensiveness in view of the all too plausibly indicated purpose to satisfy an unworthy prosecutive craving for the jailing of these unpopular individuals?

3. Does not a case of this type, where the immunity-conferral power gives indication of having been used high-handedly to bring about the jailing of "pariahs" on charges of criminal contempt, call for a reconsideration of *Ullmann* v. *United States,* 350 U.S. 422 and *Brown* v. *Walker,* 161 U.S. 591—as applied here to state immunity in the light of *Malloy* v. *Hogan,* 378 U.S. 1 and *Murphy* v. *Waterfront Commission,* 378 U.S. 52—to determine whether conferral of immunity can satisfy the Fifth Amendment in face of the fact that immunity deprives the individual of his free choice to remain silent under the constitutional privilege without pain of contempt, and subjects him to a risk of perjury prosecution which he would not have to incur if he retained his free Fifth Amendment choice?

4. Were the summary criminal contempt procedures here used, whereby petitioners were summarily convicted for refusal to obey a Judge's order directing them to answer the Grand Jury's questions, a violation of Fourteenth Amendment due process by analogy to the situation in-

volved in *Harris* v. *United States,* 382 U.S. 162, where, applying F.R. Cr. P. 52(b), this Court held that an alleged contempt in such circumstances does not justify summary punishment as for a contempt *in facie curiae* absent circumstances of emergency?

5. Under New York law, did an incomplete immunity become lodged when the witnesses (being prospective defendants) were sworn by the Grand Jury, did this preclude any subsequent conferral of the complete statutory immunity under N. Y. Penal Law §2447, and does the defectiveness of the immunity conferrals thereby arising under State law subject petitioners to the risk of both State and Federal prosecution notwithstanding the ostensible conferral of State immunity? (Not argued herein, but preserved in the event of certiorari).

6. Does such risk of Federal prosecution arise also from what we claim is the constitutionally defective adjudication that the Grand Jury investigation was an authorized one, i.e., is there not a realistic danger (to the petitioners) that Federal prosecutive officials may decline to be bound by the State conferrals of immunity herein on the ground that such were fundamentally ultra vires as having been done by a State body which did not have constitutional jurisdiction of the whole basic investigative "subject matter"? (Not argued herein, but preserved in the event of certiorari).

7. In the circumstances of this case must not any conferral of immunity be constitutionally abortive because the Grand Jury questions aimed at eliciting information which in its nature might subject the witnesses to prosecution for alleged continuing or future crimes as to which "immunity" would be intrinsically and *ipso facto* illusory? (Not argued herein, but preserved in the event of certiorari).

Statutes and Constitutional Provisions Involved

The case involves the Fifth Amendment (self incrimination) and the Fourteenth Amendment (due process) of the United States Constitution. It also involves N.Y. Judiciary Law §750, subd. 3 (criminal contempt for "wilful disobedience to [the] lawful mandate" of "a court of record"); and N.Y. Penal Law §2447 (immunity). These statutes are printed in Appendix C hereto, *infra*.

Statement of the Case and of How the Federal Questions are Presented*

The petitioners were called before a Grand Jury in Kings County, New York, on various dates during October, 1965, for the asserted purpose of finding out whether alleged known criminals were using illicitly obtained money to obtain an interest in legitimate businesses, and whether the witnesses (the within petitioners) were involved in such alleged activity and in an alleged conspiracy to bring about the aforesaid purpose and to circumvent proper law enforcement by conspiring to commit the crimes of bribery, corruption, coercion, extortion and usury (Mot. Ct. App. 6).

The witnesses requested the Grand Jury to apprise them of facts which might indicate the relevancy and materiality

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* Supplementing the certified record which has been transmitted to the Clerk of this Court from the Supreme Court (or from the County Clerk) of Kings County, we are filing herewith an additional item which was before the Court of Appeals of the State of New York and which has been certified by the Clerk of that Court for filing herein. The item referred to is our printed "Notice of Motion, Affidavits and Memorandum for Permission To Appeal To Court of Appeals", consisting of 96 pages. Nine extra copies of the latter item are filed herewith because it contains practically the entire "Record" below. We cite this item *infra as "Mot. Ct. App."* The certified copy of the opinion below (printed in Appendix A hereto, *infra*) will be filed as soon as it is available, which should be momentarily.

of the interrogation in their respective particular individual cases, i.e., the witnesses respectfully wanted to know from the Grand Jury whether there was actually any legitimate or bona fide reason for interrogating them in relation to the alleged conspiracy, etc., or whether instead the witnesses were being unjustifiably harassed as persons of alleged ill repute (*ibid*).

When the information thus sought by the witnesses was not forthcoming—the Grand Jury informing each of the witnesses merely as to the general character of the investigation along the lines of our above description of the alleged conspiracy, etc.—each of the witnesses declined to testify on the ground of fear of self incrimination; there then ensued immunity conferrals, renewed refusals to testify, the Court's directions to testify, continuing refusals, and summary convictions for criminal contempt of court (*id.* 7).

Before further describing the conduct of the contempt prosecutions in the Supreme Court, Kings County, the few and meager additional specific details which the record affords as to the Grand Jury questioning of each of the witnesses (the within petitioners) should be noted: The petitioner Joseph Colombo, after being given the merely general statement of the purpose of the Grand Jury investigation, read to the Grand Jury a statement challenging the relevancy and the jurisdiction of the investigation as regards his personal affairs and also as regards his allegedly having been at a resort hotel in Sullivan County over the Labor Day weekend of 1965, and he requested an opportunity to apply to the Court for a determination as to the issue of relevancy, declining to give any other answer or statement; the immunity conferral was then made on Col-

ombo, and he again read the same statement and request, declining to state or testify otherwise. The petitioner Lawrence Gallo, after being given the generalized statement of the purpose of the Grand Jury investigation, declined to answer the question "by whom you are presently employed"; after the immunity conferral (by the Grand Jury) he again declined to answer that same question, and also the question "Do you own any interest in any business venture". The petitioner Albert Gallo after the generalized statement of purpose of the Grand Jury questioning, declined to answer the questions "What do you do for a living" and "Do you have any business venture"; after the immunity conferral he declined to answer those same questions. Both Lawrence and Albert Gallo also stated that they would refuse to answer any other questions, but it was never indicated what the area or subject matter of such other questions would be, and of course there was no direction to answer with regard to such anticipatory undefined questions. The petitioner John Oddo, after the generalized statement of purpose by the Grand Jury, declined to answer whether he knew Joseph Colombo and Salvatore Peritore, and "What business are you engaged in presently"; after the immunity conferral he again declined to answer those same questions. The petitioner Joseph Livoti, after the generalized statement of purpose, declined to answer whether he knew certain individuals; he again declined after the immunity conferral. The petitioner Salvatore Peritore, after the generalized statement of purpose, declined to answer any questions; after the immunity conferral he declined to answer whether he knew John Oddo or Joseph Colombo. *Id.* 7-8.

In connection with the above mentioned Labor Day weekend at a hotel in Sullivan County, the District Attorney stated to the Court, in applying for the contempt punishments, that Colombo and the two Gallo brothers "attended a meeting" at a hotel in Sullivan County, but it was manifest that the District Attorney had no other information than that those three individuals had allegedly been at the hotel; we may here note that the hotel involved was the famous Concord Hotel, where some three to four thousand people were present on the Labor Day Holiday (*id.*, 8-9).

The District Attorney's application (on behalf of the Grand Jury) to the Supreme Court, Kings County took the form of an application for a direction of the Court to the witnesses to return to the Grand Jury and answer questions or, in the alternative, for an order adjudging each of them in criminal contempt pursuant to N.Y. Judiciary Law §750, subd. 3, upon their failure to comply with the Court's direction to do so (*id.* 48).

The ensuing contempt proceedings were conducted summarily as we previously said, notwithstanding that certain safeguards of a deliberately paced nature were admittedly granted by Mr. Justice Barshay (before whom the application for a direction to answer or for contempt adjudication was brought). Requests by the witnesses for a hearing or trial upon charges with opportunity to make defense and to call and examine witnesses on the issue of their guilt or innocence of wilfull or intentional criminal contempt were denied by Judge Barshay (*id.* 9). Requests for disclosure of the full Grand Jury minutes were also denied, notwithstanding the contention on behalf of the witnesses that their entire basic position—that they earnestly felt con-

vinced they were being harassed and victimized by some sort of dragnet or merely suspicion-founded inquistion into their private affairs by reason of their allegedly unfavorable reputations—in justification of their respectful declination to submit to the Grand Jury's intrusions and in justification of their entire basic position likewise of respectful defense to the charges of criminal contempt, could not be effectively demonstrated by them on the record without access to the full Grand Jury minutes (*ibid*). Judge Barshay's reply to this position of the witnesses was that the Court itself had examined the Grand Jury minutes and was satisfied that the investigation was proper. When counsel for the witnesses pointed out that this confronted their clients with an ex parte method of adjudication upon grave criminal charges, the Court found no merit in that protest, and it adhered to its ruling that its own *in camera* determination on the issues of relevancy and materiality was conclusive for the purposes of the summary criminal contempt adjudications which it was then and there making (*ibid*).

The above-summarized defense contentions that we were entitled to a due process hearing on the fundamental issue of the legitimacy or bona fides *versus* the merely suspicion-founded or dragnet or "fishing" character of the Grand Jury investigation, were urged not only by the defendants themselves before the Grand Jury but also by defense counsel in oral argument and in briefs before the Supreme Court, Kings County (Judge Barshay). Oral arguments on these points was had before the latter Court on October 20 (and once more on December 7, 1965, after the Court had recalled the parties to announce the decision already reached), and said oral argument was the closest that these

petitioners ever got to having a "trial" in these criminal contempt prosecutions. For example, in the argument proceedings on October 20, 1965, counsel for three of the petitioners stated to the Court as follows (*id.* 10):

> "Now, there is an overall picture here, your Honor, as to whether or not without any showing by the District Attorney that a citizen of this city is some way directly connected with this investigation; whether a citizen can be plucked by a subpoena before a grand jury and there, before the grand jury, given immunity as he is told there is an investigation into bribery and conspiracy—bribery of whom we don't know; conspiracy to do what we don't know—and under that guise of immunity go into all of his personal life, his finances, how he makes a living.
>
> "Now, I don't think that Section 2447 of the Penal Law was enacted for this purpose. I would like an opportunity, your Honor, to research this question and I think that this should not be done just casually, the way it is being done now, in order to have him punished for contempt immediately and, otherwise, if he doesn't answer—there is a manner of trial. The grand jury would have to be here; the minutes would have to be produced, your Honor. A record made before your Honor of exactly what these people were told before the grand jury. I submit that I would like to urge that hearing. I am entitled to a hearing, a trial, before a man can be held in contempt. I would like to urge that there would have to be some showing before your Honor to connect this particular client that I represent, or these clients, with this inquiry.
>
> "I don't think that any District Attorney has the right to subpoena indiscriminately anybody by merely saying that 'we believe and we are going to

> ask him questions and we are going to make him disclose and give him a financial questionnaire he has to answer,' where he has his money, how he got his money. I don't think that that can be done in this state of our civilization. Your Honor, we have certain basic rights under the Constitution. I think that applies to everybody, no matter who they are or what they are and that is why I am before your Honor on this situation."

Counsel for the other within petitioners presented argument similar to the above (*id.* 11).

There followed (after October 20, 1965) an exchange of briefs among the parties, but petitioners were not given access to the Grand Jury minutes *except for those portions consisting of the testimony of each of them,* which consisted merely of the above described conclusory announcement to each witness of the general purpose of the Grand Jury investigation, the refusal to give the witnesses any further information, the refusals to testify on the ground of fear of self incrimination, and the directions to testify and conferrals of immunity (*id.* 11).

On December 7, 1965 the parties were summoned back by Judge Barshay for announcement of the Court's decision. Defense counsel on the latter date again protested that they were helpless to make effective defense on behalf of their clients on the fundamental question of the bona fides or legitimacy of the Grand Jury investigation because they had been denied access to the full Grand Jury minutes. The Court stated that it had itself examined the entire Grand Jury testimony, and when one of the defense attorneys (Mr. Price) stated, "Well, we didn't have the benefit, you know",

the Court replied "You are not entitled to the benefit of it. * * * I wouldn't give that to you, Mr. Price, because that would be revealing the proceeding before the Grand Jury". A little farther on in the proceedings of December 7, 1965, when the Court remarked that " * * * every witness was given a full opportunity to express himself either personally or through counsel", Mr. Price stated "I don't think that that is accurate, sir. I don't think we have had a full opportunity to ascertain whether there was any evidence before this Grand Jury which stands to show that a conspiracy existed * * *". And when the Court reiterated that it had itself examined the Grand Jury minutes, Mr. Price said "How about counsel, aren't we entitled to know what we are arguing about? How are you going to defend a man except if you know what he is charged with specifically" (*id.* 1--12).

Under date of December 8, 1965 the Supreme Court, Kings County (Mr. Justice Barshay), rendered a written memorandum opinion, in which there was in substance reiterated the ruling above noted to the effect that the defendants were not entitled to any opportunity beyond that which they had been given for the purpose of developing their defense that the entire Grand Jury proceedings in relation to them had not been shown, through any proper procedure of due process trial or hearing, to be justified by anything except mere suspicion and an apparent policy of dragnet investigation. The memorandum opinion of Mr. Justice Barshay is printed as Appendix B hereto, *infra*.

It is evident then, as is all too typical in such "summary" contempt proceedings arising out of Grand Jury

investigations in New York State, that the instant cases were "summary" from beginning to end. They commenced with a merely oral application by the District Attorney in open court on October 20, 1965 to punish the witnesses for criminal contempt for refusal to testify before the Grand Jury in the circumstances above described (Mot. Ct. App. 13). The only "hearing" procedure which ensued was the previously described oral argument and exchange of briefs on the issue of law as to whether any further or other "hearing" or trial should be granted (*ibid*). Then, on December 7, 1965, as above recited, the Court announced its decision on the latter issue of law, the decision being adverse to the defendants, and at that moment the defendants found themselves then and there fully "ripe" for "summary" conviction of criminal contempt *in facie curiae*—subject only to the single remaining condition of the formality of expressly defying a "direction to testify" before the Grand Jury at the command of the Court (*ibid*). Later in this petition the question is examined as to whether it is even proper, under the Federal Constitution, to apply the drastic processes of "summary" criminal contempt at all to this type of *"in facie curiae"* situation, or whether such drastic procedure should be reserved for cases of an emergency nature in which a court must act forthwith to preserve the safety, the order or the dignity of the court itself.

We urged in the Courts below (e.g. Mot. Ct. App. 13-14) that, had petitioners been given the full due process hearing which they unavailingly requested on the charges of criminal contempt, there was every arguable likelihood that they could have made serious and substantial use of such

opportunity; we urged that petitioners should have been given an opportunity to explore the question which they were so insistently putting, of whether this entire Grand Jury investigation, as it purported to relate to them, was a legitimate exercise of the Grand Jury's powers of criminal investigation, or whether instead it was merely a fishing expedition, an exercise in mere suspicion, or, even worse, an unworthy attempt by the prosecutor (using the Grand Jury) to jail our clients without legal cause by "working up" an immunity-contempt situation against a group of suitable victims.

In essence, then, we urged in the Courts below (*id.* 14) that this case presents the fundamental question of constitutional due process as to whether a man may be convicted and sentenced to imprisonment, without a due process trial and indeed without any trial or hearing, for alleged criminal contempt of court in refusing to answer Grand Jury questions, when it is seriously claimed that the Grand Jury's attempted intrusions into personal privacy are simply ultra vires in point of materiality, relevancy and bona fide prosecutive inquiry; and when this earnestly asserted defense to the charges of criminal contempt is given no other "adjudication" than the *ex parte* or *in camera* "adjudication" such as occurred in this case.

On appeal to the Supreme Court of the State of New York, Appellate Division, Second Department, from the contempt convictions and sentences (30 days imprisonment, $250 fine, and additional 30 days if the fines are not paid) (Mot. Ct. App. 5-6, 33-47), the judgments of conviction were affirmed without opinion (*id.*, 5, 21-32).

The Court of Appeals of the State of New York granted us permission to appeal (Appendix A hereto *infra*).* We quote from our papers in the Court below our formal statement of the Federal questions which we presented to that Court (Mot. Ct. App. 18-19):

> "1. Were the defendants entitled to a full due process hearing, upon adequate notice, to answer the charges of criminal contempt?
>
> 2. As part of such a due process hearing, should the defendants have been given access to the complete Grand Jury minutes?
>
> 3. As part of such due process hearing, should the defendants have been given the opportunity to test out the bona fide factual justification for the Grand Jury's conclusory assertions that it was investigating an alleged conspiracy and alleged infiltration of illicitly obtained money into legitimate business; and, in particular, whether the alleged basis for the assertions that these particular witnesses were involved in those situations was sham or insufficiently substantial?
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> * * * * *

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* At the insistence of the District Attorney that the appeals before the Court of Appeals be expedited, the appeals on the merits were considered on the parties' papers filed in connection with the motions for leave to appeal, i.e., without additional briefs. The item "Mot. Ct. App." which we have been citing herein served, then, as our written presentation on the merits in the Court below. We are mentioning this because following p. 60 of said "Mot. Ct. App." appears our printed memorandum of law which served as our brief on the merits in the Court below. Since nine extra copies of the "Mot. Ct. App." item are filed herewith, this Court may if it desires conveniently read the entire text of our legal presentation in the Court below with a view to seeing how we presented the Federal questions in that Court.

5. Did an incomplete immunity become lodged when the witnesses (being prospective defendants) were sworn by the Grand Jury, did this preclude any subsequent conferral of the complete statutory immunity under Penal Law §2447, and does the defectiveness of the immunity conferrals thereby arising subject the appellants to the risk of both State and Federal prosecution notwithstanding the ostensible conferral of State immunity?

6. Does such risk of Federal prosecution arise also from what we claim is the constitutionally defective adjudication that the Grand Jury investigation was an authorized one, i.e., is there not a realistic danger (to the appellants) that Federal prosecutive officials may decline to be bound by the State conferrals of immunity herein on the ground that such were fundamentally ultra vires as having been done by a State body which did not have constitutional jurisdiction of the whole basic investigative subject matter"?

7. In the circumstances of this case must not any conferral of immunity be constitutionally abortive because the Grand Jury questions aimed at eliciting information which in its nature might subject the witnesses to prosecution for alleged continuing or future crimes as to which "immunity" would be intrinsically and *ipso facto* illusory?"

In addition, we urged in the Court below that the whole basic system of immunity legislation, as a means of overriding the privilege against self incrimination, is unconstitutional because (as we put it in our papers in the Court below at Mot. Ct. App. 84):

> "* * * no compelling reason of policy is apparent in favor of the summary contempt procedure in

> such circumstances merely because a witness has received immunity and is therefore no longer entitled to refuse to testify for fear of self incrimination. Immunity is a potent thing, surely, but it does not magically cause a total vanshing of the citizen's constitutional rights and interests. A man under immunity has thereby already lost one extremely valuable constitutional asset, and he stands in peril oflosing still another. He has lost the precious right of exercising his own free choice to remain silent under the protection of the constitutional privilege. And he may yet lose his very physical freedom itself, if upon testifying (compulsorily) he thereafter finds himself facing a prosecution (just or unjust) for perjury."

See also, again, Mot. Ct. App. 15-18, 61-96 for our more extensive written presentation of the Federal constitutional questions in the Court below.

The opinion of the Court below (Appendix A hereto, *infra*), affirming the Appellate Division's affirmance of the contempt convictions, seems to have treated our constitutional contentions as posing "primarily" the points "(1) That the testimony sought from them [the petitioners herein] was not relevant to the inquiry being conducted by the Grand Jury and (2) that they were denied due process at the hearing accorded them". The Court below does not appear to have regarded as "primary" the contention which we primarily urged (and urge here), that in these particular prosecutions for criminal contempt the defendants were entitled to a full judicial hearing on the issue of whether the Grand Jury was engaged at all in a bona fide investigation of our clients on a basis of good faith investigative belief that our clients were involved in any wrong-

doing, or whether instead the Grand Jury was merely harassing our clients as men who were in an unfavorable position to withstand a trumped up immunity-contempt prosecution.

The Court below in its opinion seems to have treated our issue of the basic bona fides of the Grand Jury's assertions of *jurisdiction* or power as involving only the issue of the *relevancy* of the Grand Jury questions, i.e., their relevancy to the subject of the investigation. But we were not challenging merely the relevancy of the questions to the claimed subject of investigation; we were challenging the very claim itself concerning the genuineness of the subject of the investigation and we were contending that the Grand Jury had no evidentiary or factual justification whatever to question our men about the claimed subject of investigation; we were urging that as part of our right to defend ourselves against charges of criminal contempt we were constitutionally entitled to a trial of the issues of fact as to whether in truth the Grand Jury had any foundation beyond mere unsupported suspicion for questioning *these particular witnesses about this particular alleged "racketeering" subject matter.*

That the Court below was indeed reductively treating our tendered issue of basic constitutional fact as amounting to nothing more than an issue of "relevancy", is perhaps most clearly indicated in the remark in the opinion below that "* * * the appellants were subpoenaed to testify because, *according to the District Attorney,* they are all associated, either directly or through each other, with two Kings County corporations that are among the enterprises under investigation"—i.e., investigation "to determinte whether

criminals have infiltrated into legitimate businesses in Kings County and are now using them as covers for further illicit activities" (emphasis added) (Appendix A hereto, *infra*). And immediately following this language the Court below went on to say that "The relevancy of the testimony sought from these witnesses is, therefore, clearly 'susceptible of intelligent estimate' " (*ibid*). Thus, the Court below, proceeding in a manner analogous to the *in camera* and *ex parte* "adjudication" by Judge Barshay who had ruled that it was enough if the Court alone looked at the Grand Jury minutes to determine the basic bona fides of the investigation, appears to have gone even further in this *ex parte* vein because the Court below apparently deemed it sufficient that the basic bona fides of the investigation was unilaterally establisehed "according to the District Attorney".

Even more difficult to understand is the statement in the opinion below that, "At no time did they [the within petitioners] offer any evidence to support the charge that the District Attorney was acting in bad faith" (*ibid*). This is hard to understand, because we strove with might and main, but unavailingly, to "offer" the only "evidence" which intrinsically could "support the charge that the District Attorney was acting in bad faith", namely, the "evidence" consisting of the full Grand Jury minutes, from which we hoped to have an opportunity to demonstrate, in a proper adversary (rather than *ex parte*) and adjudicative (rather than *in camera*) proceeding that the Grand Jury and the District Attorney were "acting in bad faith".

The second (and the only other) point which the court below discussed in its opinion* was our contention that we

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* All of our other contentions in the Court below were disposed of by the statement in the opinion that "we have considered the other arguments advanced by the petitioners and conclude that they too are without merit" (Appendix A hereto *infra*).

were denied a due process hearing in the contempt proceedings. This portion of the opinion below is puzzling; as we read it, it repeats the same reductive approach to what we conceive to be the central issue of constitutional fact in this case. For the Court below in discussing the question of whether we were given an adequate due process trial on the contempt charges, simply glosses over, as apparently being of no constitutional importance, the fundamental issue of the bona fides of the investigation and of our due process right to explore that issue *via* the full Grand Jury minutes. The Court below in this second branch of its opinion once again speaks merely of the relevancy (or the "relationship") of the testimony sought to the purposes of the Grand Jury inquiry. Also, this second branch of the opinion below reasons that the contempt proceedings were not "summary" because they involved "notice", representation by counsel, and other incidents which the Court below deemed to show that due process procedures were followed. But none of these due process incidents adduced in the opinion below touches the central issue as to denial of the right to a due process hearing or trial on our claim that the whole Grand Jury inquiry in regard to our clients was sham and a bad faith device for processing these men into prison by the immunity-contempt avenue. We quote the full text of this second branch of the opinion below (Appendix A hereto, *infra*):

> "The appellants complain that they were subjected to "summary" treatment at trial, depriving them of due process by denying them an adequate opportunity to contest the propriety of the questions. However—whether or not the court could have acted summarily (see *People* v. *Hackley*, 24

N.Y. 74, 79-80)—the record establishes that the proceedings below were neither "summary" nor lacking in "due process". (See *People ex rel. Cirillo* v. *Warden,* 11 N Y 2d 51, 53.)

Section 751 of the Judiciary Law provides that, in other than summary proceedings, "the party charged [with contempt] must be notified of the accusation, and have a reasonable time to make a defense." Here, the appellants were afforded ample notice of the proceedings; they were represented by counsel, apprised of the relationship between their testimony and the purposes of the grand jury inquiry and given every opportunity to explain their contumacious behavior. Moreover, each lawyer was supplied with the grand jury minutes covering the appearance of his client and given permission to submit a brief after the proceedings were adjourned. Six weeks later, when the trial judge had given full and thorough consideration to the appellants' contentions, they were afforded adidtional opportunities to justify their silence or to purge themselves of contempt. At no time did they offer any evidence to support the charge that the district attorney was acting in bad faith. Manifestly, the appellants were accorded every procedural safeguard to which they were constitutionally entitled. (See *Matter of Ushkowitz,* 15 N Y 2d 713; *People ex rel. Cirillo* v. *Warden,* 11 N Y 2d 51, *supra;* see, also, *Murphy* v. *Waterfront Commission,* 378 U.S. 52.)

The recent case of *Harris* v. *United States* (382 U.S. 162), upon which the appellants rely, is not in point. There, a recalcitrant witness before a Federal grand jury was summarily convicted of contempt. The Supreme Court reversed in order to permit precisely the type of hearing held in the present case 382 U.S., at pp. 165-167; see Fed. R. Crim. P. 52[b])."

Reasons for Granting the Writ

I

The reason why this is a proper case for certiorari is, in essence, the fundamental constitutional injustice of these contempt prosecutions.

Let us look the situation in the face. These petitioners are, unfortunately for them, men who are peculiarly vulnerable to governmental police oppression. When the constitutional rights of such men are disrespected by zealous prosecutive officers, there tends to be little indignation even in quarters that are in the forefront in our society as regards sensitivity to constitutional wrong against individual freedoms. It used to be a commonplace of constitutional discourse and democratic conscience, in more traditional times, that civilized constitutionalism must at all costs preserve the rights of individuals who are regarded the way these petitioners are widely regarded among the public at large.

The doctrine which seems to be expressed in the happenings of a case like this one is that if an individual but be in a sufficient plight of social odium the investigative agencies of governmental law enforcement may do with him just about as they please, free of judicial inhibition or redress. If our clients in this case are correct—and until now they have been refused all *judicial* opportunity, in the sense of a judicial *hearing*, to test out whether they are correct or not—in their protestations that they literally and simply have nothing to do with this ostensible Grand Jury subject matter and that it has nothing to do with them, and if there is truly to be no restraint upon prosecutive and

inquisitorial officialdom in the matter of "processing" alleged "racketeers" for contempt-via-immunity ordeals of the instant kind, then we have arrived at the place where every public prosecutive official who has access to a Grand Jury can reach out at will to stage an investigative bonfire fueled by men like these petitioners. If prosecutors and Grand Juries can hound such men upon the mere assertion of some sort of lurid "conspiracy", and if the victims face what amounts to non-justiciability when they plead fundamental *ultra vires* on the part of their official tormentors, the time may not be far off when more "respectable" citizens may find themselves equally helpless to fend off similar tyrannous pretensions.

We cannot believe that, when this Court discerns the shocking constitutional dynamics that have been at work in the present case, it will fail to accord relief.

To allow this kind of investigative dragnet procedure and its obvious aim of jailing men against whom no proper legal charge can be brought or sustained, to let the public prosecutors of this country arrogate unto themselves this kind of "*droit administratif*" or "executive legislation" power, and in the area of penal action to boot, is to overturn the whole basis of our system of law and government.

It is a wonderful new and easy device, that is here being fashioned, for clapping men into prison when they have not been proved to have violated any duly enacted law. All a prosecutor has to do is call a pariah before a Grand Jury, mouth to him some tendentious business about a suspected "conspiracy", give him "immunity" when the wretch balks, and then the prosecutor's only remaining problem is to make sure he does not overcrowd the jails, lest he bring

his prosecutive bonanza to a premature end for sheer lack of prison facilities.

It is easy enough for a prosecutor to reply that the law requires the giving of testimony upon the conferral of immunity. But in circumstances of the kind here being suggested, that reply is unsatisfactory. For, if the Grand Jury has no right, to begin with, to be questioning an individual at all, why should he not have the opportunity, by proper legal procedures in a proper legal tribunal, to test out the Grand Jury's assertion of power; why should he be remitted to the ex parte arbitraments of prosecutor, Grand Jury and *in camera* adjudication of criminal contempt punished by imprisonment?

II

The key to a correct insight into the constitutional evil of the instant investigative and contempt procedures consists in perceiving that, whatever might be the necessary legal policy with respect to a collateral attack by a witness in Grand Jury proceedings (as by bringing a motion to quash the Grand Jury subpoena), the Constitution admits of no doubt that when the witness has become transformed into a defendant in criminal contempt proceedings, he must be given adequate constitutional opportunity to make his defense against the criminal charges. Due process guarantees, or ought to guarantee, the right to challenge, by way of defense to criminal contempt charges, an indicatedly sham or otherwise fundamentally unjustified intrusion by a Grand Jury against a citizen's constitutional rights of privacy.

We respectfully ask this Court to take the few moments needed to reread the simple, strong words of Mr. Justice

Holmes in *Federal Trade Commission* v. *American Tobacco Co.*, 264 U.S. 298—in which the passages most frequently quoted are (264 U.S. at pp. 305-306):

> "* * * Anyone who respects the spirit as well as the letter of the 4th Amendment would be loath to believe that Congress intended to authorize one of its subordinate agencies to sweep all our traditions into the fire * * *, and to direct fishing expeditions into private papers on the possibility that they may disclose evidence of crime. We do not discuss the question whether it could do so if it tried, as nothing short of the most explicit language would induce us to attribute to Congress that intent * * *. It is contrary to the first principles of justice to allow a search through all the respondents' records, relevant or irrelevant, in the hope that something will turn up. * * *"

Along with Mr. Justice Holmes' reminder of the constitutional presumption, as it were, in favor of the individual's right of privacy against offered governmental intrusions, it should be remembered also that our constitutional provisions for protection of individual privacy, as for example in the search and seizure provisions, "did not confer a right upon the people. * * * The right guaranteed was a right already belonging to the people, coupled with a rigidly restricted permission to invade the existing right. * * * To view the amendment as a limitation upon an otherwise unlimited right of search is to invert completely the true posture of rights and the limitations thereon." *District of Columbia* v. *Little*, 178 F. 2d 13 (C.A.D.C., 1950), aff'd 339 U.S. 1.

In other words, it is not, in any particular instance, the right to be let alone in one's privacy which has to prove itself as against offered intrusion; it is, rather, the searcher's or demandant's intrusion which has to be shown to be justifiable as against the traditionally, nay the axiomatically presumed "right of the people to be secure in their persons, houses, papers, and effects," U.S. Const., Amdt. IV.

Had the present petitioners been given the full due process hearing which they unavailingly requested in the proceedings below on the charges of criminal contempt, there is every arguable likelihood that they could have made serious and substantial use of such opportunity. The petitioners should have been given an opportunity to explore the question which they were so insistently putting, of whether this entire Grand Jury investigation, as it purported to relate to them, was a legitimate exercise of the Grand Jury's powers of criminal investigation, or whether instead it was merely a fishing intrusion upon constitutionally protected individual privacy, an exercise in mere suspicion, or, even worse, an unworthy attempt by the prosecutor (using the Grand Jury) to jail our clients without legal cause by "working up" an immunity-contempt situation against a group of suitable victims.

The *in camera* and *ex parte* determination of these questions was not a substitute for a due process hearing.

The powers of a Grand Jury "may not be had to accomplish an 'ulterior' purpose * * * [T]he indiscriminate summoning of witnesses in a spirit of meddlesome inquiry, on the mere chance that some crime may be discovered, is for-

bidden under the rules of the common law." 24 *Am. Jur.*, pp. 857-858 (*Grand Jury*, § 34). *Hale* v. *Henkel*, 201 U.S. 43, 63, noted that there have been times (fortunately rare, it would seem) where courts have had to "deal with the abuses of the [Grand Jury] system, as the indiscriminate summoning of witnesses with no definite object in view, and in a spirit of meddlesome inquiry"—this evidently being the source of the language above quoted from "American Jurisprudence". The Court went on to say, in *Hale* v. *Henkel* (p. 65), that "Doubtless abuses of this power may be imagined, as if the object of the inquiry were merely to pry into the details of domestic or business life. But were such abuses called to the attention of the court, it would doubtless be alert to repress them. * * * The Grand Jury may not indict upon current rumors or unverified reports * * * ".

Should not the within petitioners have been given an opportunity in the criminal contempt proceedings to develop, by a full factual trial, their contention that precisely the kind of abuses referred to in the above quotations from *Hale* v. *Henkel* were occurring in this case; should not the Courts below have welcomed the opportunity to "be alert to repress them"?

We may add that in *Hale* v. *Henkel* (at 201 U.S. p. 64) the Court specifically noted the New York case of *In Re Morse*, 42 Misc. 664, 18 N.Y. Crim. Rep. 312, 87 N.Y. Supp. 721 (Gen. Sess. N.Y. Co. 1904) for "the principle that it must be made to appear to the Grand Jury that there is reason to believe that a crime has been committed, and that they have not the power to institute or prosecute an inquiry on the chance that some crime may be discovered".

In a series of "Annotations" in 22 A.L.R. 1361 et seq., 106 A.L.R. 1384 et seq. and 120 A.L.R. 439 et seq., numerous cases are discussed from several American jurisdictions where the precise issue which we are here urging was decided favorably to our position, i.e., where it was held that a witness could not be convicted of criminal contempt without a hearing on his claim of unauthorized Grand Jury intrusion or where a hearing was had on such claim and the intrusion was found unauthorized.

III

Notwithstanding the simplistic suggestions of the Court below that the actual conduct of these contempt prosecutions was not "summary" merely because the proceedings were not instantaneous, or because counsel were heard, or because a nominalistic issue of "relevancy" was considered, etc., we are respectfully obliged to contend that, in regard to the central and overriding issue of this case—the issue of the right to make defense against the criminal contempt charges by testing the basic constitutional genuineness of the Grand Jury's assertion of investigative power—the proceedings in this case have thus far been conducted, and approved, on a conception that the remedy of criminal contempt for refusal to answer before a Grand Jury is intrinsically a summary type of remedy. Nothing could be more erroneous than this. A trial should have been had in the present case, and it should have been in all substantial respects the equivalent of a trial for crime. It is familiar that the general ambit of defenses in a trial for criminal contempt is not discernibly different from that in prosecutions for crime. *Cooke* v. *United States*, 267 U.S. 517, 536-539. The right of a defendant in a trial for criminal contempt to assert his defenses is founded in constitutional

due process (*ibid*); cf. *United Mine Workers*, 330 U.S. 258, 363-376 (dissenting op.). Full right to make "defense or explanation" are accorded to defendants in criminal contempt trials. *Cooke* v. *United States, supra.*

Our theme that this case is simply not an appropriate one for the extraordinary processes of "summary" contempt, may be all the more confidently asserted—in relation to the particular facts of our situation—in view of *Harris* v. *United States*, 382 U.S. 162, where, as here, a Grand Jury witness refused to testify despite immunity, he continued his refusal *in facie curiae*, he was summarily convicted of criminal contempt, a request for a hearing being refused, and this Court reversed on the ground that:

> "* * * Summary contempt is for 'misbehavior' (*Ex parte, Terry*, 128 U.S. 289, 314) in the 'actual presence of the Court.' Then speedy punishment may be necessary in order to achieve 'summary vindication of the court's dignity and authority.' *Cooke* v. *United States*, 267 U.S. 517, 534. But swiftness was not a prerequisite of justice here. Delay necessary for a hearing would not imperil the grand jury proceedings."

The Courts below in our case may not have grasped the full import of *Harris*. *Harris* was not merely an interpretation of one of the Federal rules of criminal procedure in Title 18 of the United States Code (Rule 42). That is manifestly not the sole basis of the *Harris* ruling, which is couched, as seen in the above quotation, in the terminology of constitutional analysis and basic constitutional fairness. *Harris* reflects the idea that there is no discernible reason of policy, from a standpoint of constitutional fairness or of governmental need, for allowing resort to the drastic

remedy of summary criminal contempt when (as must usually be the case, and as is surely the case here) a Grand Jury can wait a while as the alleged contemnor is given his due process day in court. When attention is focused, as it should be, on the issue of a defendant's right to a proper trial opportunity to answer charges of criminal contempt, the entire constitutional evaluation of the relative interests of the Grand Jury and the witness becomes wiser and more in keeping with Anglo-American traditions. And, as earlier suggested, there perhaps tends to be a failure to distinguish between such rights of a criminal defendant on one hand, and the right of a Grand Jury witness to stay or impede the inquiry at an inconveniently early stage as by moving to quash the subpoena, etc. Policy may require the subordinating of the witness' interests to the Grand Jury's interests in that latter situation. Policy can seldom if ever justify, much less require, the subordinating of the interests of the criminal contempt defendant to the interests of the Grand Jury when the conflict between those interests arises out of the defendant's prayer to be accorded his constitutional right of due process.

IV

We broached to the Court below (Mot. Ct. App. 84) that immunity legislation of the characteristic type here involved (N.Y. Penal Law §2447) is constitutionally inadequate to overcome the Fifth Amendment privilege because conferral of such immunity leaves the witness subject to the risk of prosecution for contempt and perjury. The Court below was understandably not in a position to take up this great constitutional issue in the face of decisions like *Ullmann* v. *United States,* 350 U.S. 422, reh. den. 351 U.S. 928, and *Brown* v. *Walker,* 161 U.S. 591, but this Court is of

course free to do so, and to return to the more libertarian policies expressed in *Boyd* v. *United States,* 116 U.S. 616—cf. the dissenting opinion in *Ullman* at 350 U.S. 440 et seq.

A man who is unwillingly placed under immunity has thereby already lost one extremely valuable constitutional asset, and he stands in peril of losing still another. He has lost the precious right of exercising his own free choice to remain silent under the protection of the constitutional privilege and without facing prosecution for contempt. And he may yet lose far more, if upon testifying (compulsorily) he thereafter finds himself facing a prosecution (just or unjust) for prejury.

CONCLUSION

It is respectfully prayed that this joint petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Opinion of the Court of Appeals of the State of New York

STATE OF NEW YORK

COURT OF APPEALS

No. 86.

In the Matter of

the Application of Aaron E. Koota,
District Attorney, Kings County, &c.,

Respondent,

to punish Joseph Colombo, & ors.

Appellants.

FULD, J.:

The appellants, although granted the complete immunity provided for by section 2447 of the Penal Law, refused to testify before a Kings County Grand Jury and were adjudged guilty of criminal contempt (Judiciary Law, §750, subd. 3). The Appellate Division unanimously affirmed and this court granted leave to consider, primarily, two grounds urged by the appellants for reversal, namely, (1) that the testimony sought from them was not relevant to the inquiry being conducted by the grand jury and (2) that they were denied due process at the hearing accorded them.

It has long been the rule in New York that "there can be no punishment for contempt for * * * [refusing to testify before the grand jury] unless the court is shown that the

evidence demanded may be relevant and proper". (*Matter of Spector* v. *Allen,* 281 N.Y. 251, 258; see *Matter of Manning* v. *Valente,* 272 App. Div. 358, affd. 297 N.Y. 681; *People* v. *Doe* [*Byk*], 247 App. Div. 324, affd. 272 N.Y. 473; *Matter of Greenleaf* v. *Goldstein,* 176 Misc. 566, affd. 266 App. Div. 658, affd. 291 N.Y. 690.) However, although the court must be apprised of "the nature of the evidence demanded and of its relation to the subject of the investigation" (*Matter of Spector* v. *Allen,* 281 N.Y. 251, 258, *supra*), the relevancy of the questions need not be conclusively established. It is enough if the "bearing [of the questions] on the subject of the investigation was susceptible of intelligent estimate" (*Matter of Spector* v. *Allen,* 281 N.Y. 251, 258, *supra*) or if there was a "justifiable suspicion that the former is related to the latter." (*People* v. *Doe* [*Byk*], 247 App. Div. 324, 326, Affd. 272 N.Y. 473, *supra.*)

Applying this test to the record before us, we find no basis for countenancing appellants' refusals to answer the questions put to them. The grand jury was and still is seeking to determine whether criminals have infiltrated into legitimate businesses in Kings County and are now using them as covers for further illicit activities. Far from being summoned "in a spirit of meddlesome inquiry" (*Hale* v. *Henkel,* 201 U.S. 43, 63; see *Hobson* v. *District Court,* 188 Iowa 1062), the appellants were subpoenaed to testify because, according to the district attorney, they are all associated, either directly or through each other, with two Kings County corporations that are among the enterprises under investigation. The relevancy of the testimony

sought from these witnesses is, therefore, clearly "susceptible of intelligent estimate."

The appellants complain that they were subjected to "summary" treatment at trial, depriving them of due process by denying them an adequate opportunity to contest the propriety of the questions. However—whether or not the court could have acted summarily (See *People* v. *Hackley,* 24 N.Y. 74, 79-80)—the record establishes that the proceedings below were neither "summary" nor lacking in "due process". (See *People ex rel. Cirillo* v. *Warden,* 11 N Y 2d 51, 53.)

Section 751 of the Judiciary Law provides that, in other than summary proceedings, "the party charged [with contempt] must be notified of the accusation, and have a reasonable time to make a defense." Here, the appellants were afforded ample notice of the proceedings; they were represented by counsel, apprised of the relationship between their testimony and the purposes of the grand jury inquiry and given every opportunity to explain their contumacious behavior. Moreover, each lawyer was supplied with the grand jury minutes covering the appearance of his client and given permission to submit a brief after the proceedings were adjourned. Six weeks later, when the trial judge had given full and thorough consideration to the appellants' contentions, they were afforded additional opportunities to justify their silence or to purge themselves of contempt. At no time did they offer any evidence to support the charge that the district attorney was acting in bad faith. Manifestly, the appellants were accorded every procedural safeguard to which they were constitutionally entitled. (See

Matter of Ushkowitz, 15 N Y 2d 713; *People ex rel. Cirillo* v. *Warden*, 11 N Y 2d 51, *supra*; see, also, *Murphy* v. *Waterfront Commission*, 378 U.S. 52.)

The recent case of *Morris* v. *United States* (382 U.S. 165), upon which the appellants rely, is not in point. There, a recalcitrant witness before a Federal grand jury was summarily convicted of contempt. The Supreme Court reversed in order to permit precisely the type of hearing held in the present case (382 U.S., at pp. 165-167; see Fed. R. Crim. P. 52[b]).

We have considered the other arguments advanced by the petitioners and conclude that they too are without merit.

The orders of the Appellate Division should be affirmed.

* * * * *

Orders affirmed. Opinion by Fuld, J. All concur.

APPENDIX B

Memorandum Opinion, Supreme Court, Kings County

MEMORANDUM OPINION, SUPREME COURT, KINGS COUNTY

(BARSHAY, J.) (Not Reported)

SUPREME COURT

KINGS COUNTY

CRIMINAL TERM—PART I

Dated December 8, 1965

In the Matter of the Application of the Regular April 1964 Grand Jury of the County of Kings, as duly extended for a direction from the court to the witnesses, JOSEPH COLOMBO, LAWRENCE GALLO, ALBERT GALLO, JOHN ODDO, JOSEPH LIVOTI, SALVATORE PERITORE and CARMINE LOMBARDOZZI, etc.,

---

This is an application of the regular April 1964 Grand Jury in the County of Kings, as duly extended, for the direction of the court, to the witnesses, Joseph Colombo, Lawrence Gallo, Albert Gallo, John Oddo, Joseph Livoti, Salvatore Peritore and Carmine Lombardozzi, to return to the Grand Jury and answer proper and legal interrogatories propounded to them, or, in the alternative, for an order adjudging each of them in criminal contempt of court pursuant to section 750, subdivision 3, of the Judiciary Law of the State of New York, upon their failure to comply with the court's direction to do so.

Appendix B—Memorandum Opinion, Supreme Court, Kings County

The regular April 1964 Grand Jury of the County of Kings, as extended, has been and is conducting an investigation to determine whether the crimes of conspiracy, bribery, corruption, coercion, extortion and usury were committed in Kings County by certain individuals. The Grand Jury heard testimony of several witnesses and examined certain books and records pertinent to the investigation. A reading of the Grand Jury minutes by the court leads it to the conclusion that the inquiry being made by the Grand Jury was in compliance with the law conferring duties upon the Grand Jury, section 245 of the Code of Criminal Procedure, which reads as follows:

> "POWER OF GRAND JURY TO INQUIRE INTO CRIMES, ETC. The Grand Jury has power and it is its duty to inquire into all crimes committed or triable in the county and to present them to the court."

Section 253 of the Code of Criminal Procedure states:

> "THE GRAND JURY MUST INQUIRE AS TO PERSONS IMPRISONED ON CRIMINAL CHARGES AND NOT INDICTED, AND THE MISCONDUCT OF PUBLIC OFFICERS.
>
> * * * * *
>
> 2. The Grand Jury must inquire into the wilful and corrupt misconduct of public officers of every description in the county."

The witness, John Oddo, appeared before the Grand Jury on October 14, 1965. He was advised as follows:

> "The Grand Jury is conducting an investigation into conspiracy to commit the crimes of bribery, corrup-

> tion, extortion, and as part of this investigation the Grand Jury has seen fit to call you as a witness. The Grand Jury is seeking to determine whether or not certain individuals have conspired to commit the aforementioned crimes as a means of entering legitimate business areas. The Grand Jury is seeking to determine that these individuals have agreed among themselves to use tactics which could be violations of the State Penal Law as a means of entering legitimate business enterprises, is that clear?"

He was further advised that if he testifies without asserting his privilege against self-incrimination, he may be waiving his rights and that anything he says may be used against him. He was further advised as follows:

> "If you are going to assert your Fifth Amendment privilege against self-incrimination, you will have to state so with respect to the questions put to you to indicate that you wish to be granted immunity by this Grand Jury. Now Mr. Oddo, in what business are you engaged in presently?"

He declined to answer on the ground that he had no opportunity to consult with his counsel and therefore he is asserting the Fifth Amendment privilege against self-incrimination. The district attorney thereupon requested the Grand Jury to grant the witness immunity from prosecution. The Grand Jury, in the absence of the witness, the stenographer and the district attorney, voted to grant the witness immunity. He returned to the Grand Jury room; was advised that the Grand Jury voted to grant him immunity whereby anything he testifies to cannot be used against him, and if he discloses any crime he cannot be in-

dicted for such crime. Upon being asked the same question, he advised the Grand Jury that he wished to consult with counsel because he did not understand the meaning of the word "immunity" and he was excused until the 20th of October.

On October 20th he returned to the Grand Jury. He was advised that he was a witness only, was permitted to consult with counsel and was asked if he knew persons by the names of Salvatore Peritore and Joseph Colombo. He declined to answer on the ground that to do so would degrade and incriminate him. He left the Grand Jury room with the district attorney and stenographer. Upon his return, the district attorney advised him that the Grand Jury had voted to grant immunity to him. He was further advised that he no longer has the legal right to refuse to answer questions and that he could be punished for contempt of court for refusing to answer the questions, and he was further advised that if he answered questions falsely, he could be charged with the crime of perjury; but if he did answer the questions, he could not be prosecuted for any crime which his testimony might show he committed, and his testimony could never be used against him in any way. He replied that the advice was clear to him; he was then asked the same questions and he declined to answer on the ground that to do so would degrade and incriminate him.

The witness, Joseph Livoti, appeared before the Grand Jury on October 20th. The identical procedure was followed with respect to him as was done with respect to the witness Oddo. He was advised that he was a witness only and was asked if he knew certain individuals. He thereupon de-

clined to answer on the ground that to do so would degrade and incriminate him. The Grand Jury in his absence voted to grant immunity to him and upon his return to the Grand Jury room he was so advised. The district attorney then explained to him the meaning of the immunity granted. The same questions again were put to him with respect to his knowledge of certain individuals and again, despite the grant of immunity given him by the Grand Jury, he declined to answer them on the ground that to do so would degrade and incriminate him.

The witness, Salvatore Peritore, appeared before the Grand Jury on October 20, 1965 and was advised that he was a witness only. He was further advised of the purpose of the investigation and that there was evidence that he and 5 or 6 others met in the Hotel Concord in Sullivan County on September 6, 1965, and that the Grand Jury was desirous of knowing the purpose of that meeting. Permission was given him to consult with his attorney. Thereafter questions were put to him which he declined to answer on the ground that his answers would degrade and incriminate him. He thereupon left the Grand Jury room and in his absence the Grand Jury voted to grant immunity to him. He returned to the Grand Jury room, was apprised of that fact and the meaning thereof and was again asked the same questions and again declined to answer them on the ground that to do so would degrade and incriminate him.

The witness, Albert Gallo, appeared before the Grand Jury; was advised that he was a witness only; was asked certain questions which he declined to answer on the ground

that to do so might tend to incriminate him and asserted that he would decline to answer any questions put to him on the ground that they would violate his Federal constitutional privilege against self-incrimination. He left the Grand Jury room and the Grand Jury voted to grant immunity to him. When he returned to the Grand Jury room he was so advised and the meaning of the immunity granted was explained to him. The same questions were put to him and he again declined to answer them on the ground of self-incrimination. He then was directed by the Foreman to answer the questions, which he refused to do.

The witness, Lawrence Gallo, appeared before the Grand Jury and was advised of the purpose of the Grand Jury investigation. Questions were put to him, which he declined to answer on the ground that to do so would degrade and incriminate him. He also questioned the jurisdiction of the Grand Jury. He, too, left the Grand Jury room and the Grand Jury voted to grant immunity to him. When he returned, he was so advised and was explained the meaning of the immunity granted. The same questions again were put to him and he declined to answer them on the same ground. The Foreman directed him to answer; he declined to do so and again asserted his privilege against self-incrimination.

The witness, Carmine Lombardozzi, appeared before the Grand Jury on September 16th. He was advised of the purpose of the investigation, of his right to consult with counsel, of his right to assert his privilege against self-incrimination under the Federal and State constitutions, and of his right to assert such privilege in response to any

questions put to him. Questions were put to him which he declined to answer on the ground that it would degrade and incriminate him. He advised the Grand Jury that he would continue to assert the privilege against self-incrimination in respect to any and all questions put to him unless he was granted immunity. He thereupon left the room. Upon his return he was advised that in his absence the Grand Jury had voted to grant immunity to him and was explained the meaning of the immunity granted. He then was asked if he knew certain individuals. He replied that he is under charges of assault in Kings County in the State Court and under indictment in a Federal court for income tax evasion for the years 1961 and 1963. He stated that he was prepared to answer all questions the law required him to answer but challenged the Grand Jury's power to inquire into his personal finances and business transactions on the ground that they were not material or relevant to the investigation. He also requested a determination by the court as to "what relevancy, if any, his personal business affairs have to do with this investigation and upon what basis he has been selected as a witness, whose commercial and personal financial transactions should be investigated."

The witness, Joseph Colombo, appeared before the Grand Jury on October 14, 1965. He was informed that he was only a witness and was told the purpose of the Grand Jury investigation. He then made a statement challenging the Grand Jury's power and jurisdiction to inquire into any events alleged to have occurred in Sullivan County, and its power and jurisdiction to inquire into his personal finances, business transactions and other personal affairs

on the ground that they were not relevant to the Grand Jury's investigation. He then asked the court to rule on the relevancy of his personal finances and business affairs to the investigation, and declined to answer any questions on the aforesaid grounds. He was excused from the Grand Jury room and in his absence the Grand Jury voted to grant immunity to him. When he returned to the Grand Jury room he was so advised and the meaning of the immunity granted was explained to him. He repeated his challenge regarding the power and jurisdiction of the Grand Jury to inquire into the matters above set forth.

Each of the witnesses at all the aforesaid times was represented by counsel who orally argued their respective contentions. In addition, the minutes of the proceedings were furnished to counsel.

In response to the request of the witness, Colombo and Lombardozzi, for a decision of this court as to the relevancy of the inquiry into their personal finances and business transactions and as to the jurisdiction of the Kings County Grand Jury to investigate alleged occurrences in Sullivan County, the court holds that the information sought by the Grand Jury is within its jurisdiction and relevant and material to this investigation. An investigation by a Grand Jury involves all of the powers and incidents necessary to complete inquiry into such matter (*People ex rel. Karlin* v. *Culkin*, 248 N.Y. 465). While the Grand Jury was under no obligation to reveal to the witnesses prior to their testifying the subject or materiality of the inquiry (*Application of Intercity Associates*, 207 Misc. 1012, 142 N.Y.S. 2d 412; *Matter of Manning* v. *Valente*, 272

App. Div. 388, 72 N.Y.S. 2d 88, affd. 297 N.Y. 681), in this instance each of the witnesses was so advised. The witnesses are not entitled to have the investigation halted to permit "forecasts of the testimony and nicely balanced arguments as to its probable importance" (*Matter of Manning* v. *Valente, supra*). The witnesses have failed to sustain their burden of demonstrating any bad faith or patent invalidity in this inquiry (*Matter of Greenleaf,* 176 Misc. 566, determination confirmed, *sub nom.; Matter of Greenleaf* v. *Goldstein,* 266 App. Div. 658; affd. 291 N.Y. 690).

The court holds that while the Grand Jury is empowered to inquire into all crimes committed or triable in its County, it has broad powers to investigate whether or not a crime has been committed within its jurisdiction (*Blair* v. *United States,* 250 U.S. 273). If there is proof that a crime or a conspiracy to commit a crime originated in Kings County, the Grand Jury has the power to inquire whether the conspiracy continued and has culminated in any other locality within or without its jurisdiction.

The court further holds that the immunity granted to each of the witnesses, pursuant to section 2447 of the Penal Law, protects each of them against prosecution for any crime that their testimony may disclose and is co-extensive with their privilege against self-incrimination in the State and Federal courts (*Murphy* v. *Waterfront Commission,* 378 U.S. 52). In other words, testimony obtained under the grant of immunity conferred upon each of the witnesses cannot be used, directly or indirectly, by the Federal Gov-

ernment, against them, in any prosecution for the Federal crime.

The court accordingly holds that each witness has been granted full and complete immunity from prosecution for or on account of any transaction, matter or thing concerning which he gives testimony in this jurisdiction, or the use directly or indirectly of said testimony in the Federal or any jurisdiction.

I therefore direct:

That each of the witnesses return to the Grand Jury and answer the competent legal and proper interrogatories put to him.

In view of the fact that each witness has appeared before me this day with his counsel, has been informed of the court's determination herein, and each witness except Carmine Lombardozzi, who has informed the court that he will and did return to the Grand Jury to testify and whose examination is presently incomplete, has advised the court that he will not answer any of the legal and proper interrogatories put to him, I find that each is guilty of a criminal contempt of court in violation of section 750, subdivision 3, of the Judiciary Law, in that each witness in the immediate presence of the court has wilfully disobeyed the lawful mandate of this court to answer legal and proper interrogatories; and for such criminal contempt each of the witnesses, except Carmine Lombardozzi, is hereby sentenced to the Civil Prison of the City of New York for a term of 30 days, and in addition thereto to pay a fine of $250., and in the event said fine is not paid, he shall be imprisoned for an additional term of 30 days.

Submit order.

APPENDIX C

Statutes Involved

1. N. Y. Penal Law, § 2447

§2447. Witnesses' immunity

1. In any investigation or proceeding where, by express provision of statute, a competent authority is authorized to confer immunity, if a person refuses to answer a question or produce evidence of any other kind on the ground that he may be incriminated thereby, and, notwithstanding such refusal, an order is made by such competent authority that such person answer the question or produce the evidence, such person shall comply with the order. If such person complies with the order, and if, but for this section, he would have been privileged to withhold the answer given or the evidence produced by him, then immunity shall be conferred upon him, as provided for herein.

2. "Immunity" as used in this section means that such person shall not be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which, in accordance with the order by competent authority, he gave answer or produced evidence, and that no such answer given or evidence produced shall be received against him upon any criminal proceeding. But he may nevertheless be prosecuted or subjected to penalty or forfeiture for any perjury or contempt committed in answering, or failing to answer, or in producing or failing to produce evidence, in accordance with the order, and any such answer given or evidence produced shall be admissible against him upon any criminal proceeding concerning such perjury or contempt.

3. "Competent authority" as used in this section means:

(a) The court or magistrate before whom a person is called to answer questions or produce evidence in a criminal proceeding other than a proceeding before a grand jury, when such court or magistrate is expressly requested by the prosecuting attorney to order such person to give answer or produce evidence; or

(b) The court before whom a person is called to answer questions or produce evidence in a civil proceeding to which the state or a political subdivision thereof, or a department or agency of the state or of such political subdivision, or an officer of any of them in his official capacity, is a party, when such court is expressly requested by the attorney-general of the state of New York to order such person to give answer or produce evidence; or

(c) The grand jury before which a person is called to answer questions or produce evidence, when such grand jury is expressly requested by the prosecuting attorney to order such person to give answer or produce evidence; or

(d) A legislative committee or temporary state commission before which a person is called to answer questions or produce evidence in an inquiry or investigation, upon twenty-four hours prior written notice to the attorney-general of the state of New York and to the appropriate district attorney having an official interest therein; provided that a majority of the full membership of such committee or commission concur therein; or

(e) The head of a state department or other state agency, a commissioner, deputy or other officer before whom a per-

son is called to answer questions in an inquiry or investigation, upon twenty-four hours prior written notice to the attorney-general of the state of New York and to the appropriate district attorney having an official interest therein.

Provided, however, that no such authority shall be deemed a competent authority within the meaning of this section unless expressly authorized by statute to confer immunity.

4. Immunity shall not be conferred upon any person except in accordance with the provisions of this section.

5. If, after compliance with the provisions of this section, or any other similar provision of law, a person is ordered to answer a question or produce evidence of any other kind and complies with such order, and it is thereafter determined that the appropriate district attorney having an official interest therein was not notified, such failure or neglect shall not deprive such person of any immunity otherwise properly conferred upon him. Added L.1953, c. 891, § 1, eff. Sept. 1, 1953.

2. N. Y. JUDICIARY LAW, § 750, SUBD. 3

§ 750. Power of courts to punish for criminal contempts

A. A court of record has power to punish for a criminal contempt, a person guilty of any of the following acts, and no others:

• • • • •

3. Wilful disobedience to its lawful mandate.